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In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

TRI-STATE MOTOR TRANSIT CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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49pp

QUESTION PRESENTED

Whether the Hobbs Act, 28 U.S.C. 2341 *et seq.*, bars relitigation of the validity of an agency rule after the rule has been upheld by another court of appeals and the statutory 60-day period for seeking judicial review has expired.

PARTIES TO THE PROCEEDING

Respondents here include, in addition to Tri-State Motor Transit Co., the American Trucking Associations, Inc., and the International Brotherhood of Teamsters, Chauffeurs, and Warehousemen of America, Inc., an intervenor below. The Denver & Rio Grande Western Railroad Company also participated below as an intervenor.

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No.

INTERSTATE COMMERCE COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

TRI-STATE MOTOR TRANSIT CO., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Interstate Commerce Commission and the United States, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-8a) is reported at 739 F.2d 1373. The decisions of the Interstate Commerce Commission (App., *infra*, 11a-15a, 16a-21a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 9a) was entered on August 3, 1984. A petition for rehearing was denied on October 26, 1984 (App.,

infra, 10a). On January 15, 1985, Justice Blackmun entered an order extending the time for filing a petition for a writ of certiorari to and including March 25, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and 2350(a).

STATUTES INVOLVED

Pertinent provisions of the Administrative Orders Review Act of 1950 (or Hobbs Act), 28 U.S.C. 2341 *et seq.*, are set forth at App., *infra*, 22a-28a.

STATEMENT

1. The Administrative Orders Review Act of 1950, 28 U.S.C. 2341 *et seq.*, known as the Hobbs Act, vests jurisdiction to review orders of six federal agencies,[1] including the Interstate Commerce Commission (ICC), in the courts of appeals (28 U.S.C. 2342).[2] The Act also provides that a party aggrieved by a final order by one of the specified agencies "may, within 60 days after its entry, file a petition to re-

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[1] In addition to those specified in the statute, orders of several other federal agencies are covered by the judicial review provisions of the Hobbs Act. 8 U.S.C. 1105a(a) (Immigration and Naturalization Service deportation orders), 39 U.S.C. 3628 (Postal Rate Commission orders), 50 U.S.C. 167h(b) (Department of Interior orders), 31 U.S.C. 755 (Personnel Appeals Board of the General Accounting Office orders).

[2] The orders of the Interstate Commerce Commission were, prior to 1975, reviewed by three-judge district courts, with appeals directly to this Court, under the Urgent Deficiencies Appropriation Act of 1913, ch. 32, 38 Stat. 208 *et seq.*, and the Expediting Act of 1903, ch. 544, 32 Stat. 823 *et seq.* In 1975, Congress amended the Hobbs Act to bring the ICC under that system of judicial review. Pub. L. No. 93-584, 88 Stat. 1917 *et seq.*

view the order in the court of appeals wherein venue lies." 28 U.S.C. 2344. The agency is directed to "file in the office of the clerk the record on review as provided in section 2112." 28 U.S.C. 2346. The Act then provides, as follows, 28 U.S.C. 2349(a):

> The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

2. In January 1983, the ICC issued a final policy statement in Ex parte No. MC-156, *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (served Jan. 6, 1983), abolishing the so-called "special circumstances" doctrine in the licensing of rail-affiliated motor carriers.[3] The American Trucking

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[3] The "special circumstances" doctrine was a longstanding exception to the national policy to protect motor carriers from encroachment by railroads. Under that exception, the ICC could grant to a railroad unrestricted motor carrier operating authority if it was shown that (1) the grant would not restrain competition, and (2) the public interest required the proposed service which existing carriers had not offered except where it suited their convenience. See *American Trucking Associations, Inc.* v. *United States*, 364 U.S. 1 (1960).

Following enactment of the Motor Carrier Act of 1980, Pub. L. No. 96-296, 94 Stat. 793 *et seq.*, and the Staggers Rail Act of 1980, Pub. L. No. 94-448, 94 Stat. 1895 *et seq.*, which loosened regulatory strictures on the trucking and rail indus-

Associations, Inc. (ATA) (and several of its affiliated conferences and associations), and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) sought review of the ICC's decision in the United States Court of Appeals for the Fifth Circuit. On January 20, 1984, the court of appeals affirmed the ICC's decision in all respects. *American Trucking Associations, Inc.* v. *ICC*, 722 F.2d 1243. The ATA and the Teamsters filed a petition for a writ of certiorari that was denied by this Court. No. 83-2117 (Oct. 29, 1984).

While the Fifth Circuit was considering the challenge to the agency's policy statement, the Denver & Rio Grande Western Railroad Company (D&RGW), a rail carrier, filed an application for a motor carrier license pursuant to the Ex parte No. MC-156 policy. Only one motor carrier, Tri-State Motor Transit Co. (Tri-State), opposed D&RGW's application. A Commission employee review board, relying upon the new Ex parte No. MC-156 policy, granted the application in a decision styled *The Denver & Rio Grande W.R.R.*, ICC Docket No. MC-166474 (Sub-No. 1) (App., *infra*, 11a-15a). The ATA and the Teamsters then sought to intervene in an appeal to the full Commission to assert that D&RGW's application should have been denied be-

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tries, the ICC opened a rulemaking proceeding to reevaluate its policies governing rail-motor operating rights. After full public participation (including the American Trucking Associations (ATA)). the Commission announced the end of the "special circumstances" doctrine in licensing proceedings. No longer would a rail-affiliated motor carrier, or a railroad, need to make such a showing to obtain unrestricted motor carrier operating authority. Ex parte No. MC-156.

cause the ICC's new policy was invalid. The Commission affirmed the review board (App., *infra*, 16a-21a) and refused to entertain the ATA's and the Teamsters' arguments, noting that those parties merely sought to relitigate the validity of Ex parte No. MC-156, which was then under consideration by the Fifth Circuit (App., *infra*, 18a). The ATA, the Teamsters, and Tri-State then petitioned for review under the Hobbs Act in the Eighth Circuit, now some 11 months after the Ex parte No. MC-156 rule had been issued. The only substantive issue raised was the validity of ICC's abolition of the special circumstances doctrine—the same question then pending before the Fifth Circuit.[4]

Prior to the filing of briefs in the Eighth Circuit, the Fifth Circuit affirmed Ex parte No. MC-156. *American Trucking Associations, Inc.* v. *ICC, supra.* The Commission and the United States then argued in the Eighth Circuit that the court lacked jurisdiction to review the substantive validity of the Ex parte No. MC-156 policy because the Hobbs Act limits a court's jurisdiction to petitions filed within 60 days of the issuance of an ICC order, and because the Fifth Circuit had exclusive jurisdiction to review the validity of the ICC policy.[5]

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[4] The ATA and the Teamsters also challenged the ICC's denial of their petition to intervene in the D&RGW administrative proceedings.

[5] The government also argued that petitioners were collaterally estopped from challenging the merits of the Commission's new policy in the guise of a challenge to the D&RGW licensing proceeding because the very same petitioners had previously, and unsuccessfully, challenged the policy in another court.

3. The court of appeals rejected the government's jurisdictional argument.[6] It held (App., *infra*, 4a n.2) (emphasis added) that the Hobbs Act "precludes an attack on the *procedure* by which the policy was adopted," but "does not bar judicial review of the *substantive validity* of the rule, even if more than sixty days have elapsed since its issuance." Having concluded that it had jurisdiction, the court of appeals proceeded to affirm the Ex parte No. MC-156 policy and to affirm the issuance of D&RGW's license.

REASONS FOR GRANTING THE PETITION

The decision below incorrectly expands the jurisdiction of the courts of appeals by disrupting the repose and centralized review procedure the Hobbs Act was designed to provide. The result will be substantial and wholly unnecessary burdens on the courts, the Hobbs Act agencies, and numerous other agencies with comparable review statutes. In addition, the decision below conflicts with decisions of the Second, Fifth, Seventh and District of Columbia Circuits. Accordingly, this case presents questions of recurring and practical importance that warrant this Court's review.

1. The purpose of the Hobbs Act is to ensure prompt, centralized and authoritative final review of agency rulemaking by a single court of appeals. See H.R. Rep. 93-1569, 93d Cong., 2d Sess. 9 (1974) ("The problem of multiple suits challenging a single

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[6] Although it apparently agreed with the government's contention that petitioners were collaterally estopped from attacking the substantive validity of the policy statement, the court refused to dispose of the petition for review on that basis (App., *infra*, 2a n.1).

ICC order in different locations before different courts, would disappear and with it the potential for disparity in results and nonuniformity. [The statute] vest[s] exclusive jurisdiction in the court of appeals in which the agency record is first filed.").[7] See also H.R. Rep. 2122, 81st Cong., 2d Sess. 4 (1950) (the Hobbs Act "represents an important improvement in judicial procedure—one that will make for economy and expedition in the disposition of a considerable class of business in the Federal courts"). Among the devices employed by Congress to achieve those objectives, two are of principal importance to this case: (1) the 60-day time limit on petitions for review, and (2) the vesting in the court "in which the record on review is filed" of "exclusive jurisdiction to make and enter * * * a judgment determining the validity of * * * the order of the agency" (28 U.S.C. 2349(a)). The statute also creates a transfer procedure so that all review of an agency order may be centralized in the court of first filing (or another court selected by that court, 28 U.S.C. 2112(a)). See *Western Coal Traffic League* v. *ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984).

The court of appeals' decision has a clear potential for mischief. By opening the door for parties to challenge administrative rules long after they were promulgated, the decision below poses a threat to the principle of finality, not only for the Hobbs Act agencies, but also for the numerous other federal agencies that operate under statutes with comparable review provisions. *E.g.*, EPA, 7 U.S.C. 136n(b); Board of Governors, Federal Reserve System, 12 U.S.C.

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[7] This legislative history relates to the 1975 amendment to the Hobbs Act that added ICC orders to the list of agency actions covered. Pub. L. No. 93-584, 88 Stat. 1917 *et seq.*

1848; SEC, 15 U.S.C. 77i, 78y(b); FDA, 21 U.S.C. 346a(i), 348(g); National Credit Union Administration, 12 U.S.C. 1786(j)(2); OSHA, 29 U.S.C. 655(f); Secretary of Labor, 30 U.S.C. 811(d); Federal Mine Safety and Health Review Commission, 30 U.S.C. 816(b). Once the prescribed statutory period has expired without a petition for review having been filed, an agency is entitled to rely on its new rule in future operations. Moreover, those who are regulated by the agencies, and who often make substantial investments in order to comply with new rules, should have some certainty to guide their conduct. The statutory scheme affords that repose; the Eighth Circuit's contrary view does not.[8]

The justification for insulating an administrative rule from belated judicial challenge is even more apparent where, as here, the agency has successfully defended its rule in a court of appeals.[9] In contrast

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[8] The decision below could encourage noncompliance with administrative rules. If firms know that if and when enforcement actions are brought against them, they will be free to challenge not only the application of the rule, but its validity as well, it will inevitably reduce any incentive to comply promptly. This is particularly so where compliance would generate substantial costs that could be deferred by delay. See, *e.g.*, *RSR Corp.* v. *Donovan*, 747 F.2d 294, 301-302 (5th Cir. 1984).

[9] Indeed, the present case is more compelling still because it involves parties who participated in the initial challenge in the Fifth Circuit. Two of the three petitioners in the Eighth Circuit, ATA and the Teamsters, were parties in the prior Fifth Circuit case. The third petitioner, Tri-State, is a member of the ATA and, as such, should be barred from relitigating the issue. See *Western Coal Traffic League* v. *ICC*, 735 F.2d 1408, 1411 (D.C. Cir. 1984). Because the court of appeals did not resolve the collateral estoppel issue, and because in the more typical case subsequent challenges are made by new

to the orderly scheme Congress established, the court of appeals encourages tardy, duplicative litigation. Indeed, a literal reading of the Eighth Circuit's opinion suggests there would be nothing to stop these same parties—or anyone else—from launching exactly the same challenge the next time the ICC grants an application for rail-affiliated trucking operations. That would, of course, impose on the Commission, and on the courts of appeals, a burden Congress sought to avoid. Moreover, if that were the law, it would be more likely that a subsequent court could, upon reaching the merits, create a conflict among the circuits calling for resolution by this Court. That, too, is a result contrary to Congress's intent.[10]

It is, of course, immaterial that respondents' challenge was nominally to the D&RGW licensing order rather than to Ex parte No. MC-156. Their *sole* argument in opposition to the D&RGW order was that the Commission had invoked the policy announced in Ex parte No. MC-156. The attack was on the policy itself and merely recapitulated arguments that had been rejected by the Fifth Circuit. Accordingly, respondents' petition for review in the Eighth Circuit was in fact if not in form an attempt to obtain indirectly the untimely, repetitive review the Hobbs Act precluded them from seeking directly. See *Natural*

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parties, we do not raise the collateral estoppel issue as a separate question in this Court.

[10] The Hobbs Act created certiorari jurisdiction over agency orders in place of the direct appeal mechanism that existed previously. 28 U.S.C. 2350. The House Report stated that such a change "will save the members of the Supreme Court from wasting their energies on cases which are not important enough to call for their attention." H.R. Rep. 2122, *supra*, at 4.

Resources Defense Council v. *NRC*, 666 F.2d 595, 601-602 (D.C. Cir. 1981).

Nor can we appreciate the basis for the court of appeals' distinction between challenges to the "procedural" and "substantive" validity of agency rules, and its holding that the latter were not subject to the Hobbs Act's restrictions. The statutory language provides no support for such a distinction. Likewise, the legislative history gives no hint of a congressional intent to limit the carefully-crafted system for judicial review exclusively to "procedural" issues, while "substantive" challenges are subject to no such restrictions.

In addition, the procedure/substance distinction has no support in the case law. For example, in *Asphalt Roofing Manufacturing Ass'n* v. *ICC*, 567 F.2d 994, 1005 (D.C. Cir. 1977), the court squarely held that petitioners seeking review of certain ICC general rate increase decisions were barred from "actually challenging the validity of the Commission's rules" adopted earlier. And again in *Seacoast Anti-Pollution League* v. *NRC*, 690 F.2d 1025 (D.C. Cir. 1982),[11] petitioners challenged the substantive validity of previously-adopted regulations in the context of reviewing the agency's decision not to institute a hearing to revoke a construction permit. The court rejected petitioners' invitation to review the rules, noting that "[p]etitioners could have directly challenged the regulations after their promulgation, or they can petition the Commission to amend the regu-

[11] The District of Columbia Circuit overruled its decision in *Seacoast* on other grounds in *Lorion* v. *NRC*, 712 F.2d 1472 (1983), and that latter decision was itself reversed by this Court, No. 83-703 (Mar. 20, 1985). Neither decision in *Lorion* disturbs the proposition in *Seacoast* upon which we rely.

lations." 690 F.2d at 1029 n.14. It therefore held that Seacoast's petition for review "is not a proper mechanism for attacking regulations on substantive grounds." *Ibid.* See also *id.* at 1031. Accord, *Atchison, T. & S. F. Ry.* v. *ICC*, 687 F.2d 912, 918 (7th Cir. 1982).

2. Besides condoning untimely challenges to agency rules in violation of the 60-day limitation, the decision below is also at odds with the statutory scheme establishing "exclusive jurisdiction" in the court of appeals in which the record on review is filed. 28 U.S.C. 2349(a). Under the procedure prescribed in 28 U.S.C. 2346 and 2112, the court of appeals in which the first petition for review is filed has exclusive jurisdiction to pass on the validity of the challenged rule. With respect to Ex parte No. MC-156, that court was the Fifth Circuit, and, accordingly, no other court could entertain a like attack on the rule.

To be sure, the Eighth Circuit had jurisdiction to hear any claim that the new rule was misapplied in granting a certificate to D&RGW. But that was not the complaint. Respondents asked the Eighth Circuit to consider the same question already presented to the Fifth Circuit: the substantive validity of the new rule announced in Ex parte No. MC-156. That is what the Hobbs Act forbids.

3. The ruling below conflicts with decisions of other courts of appeals that have held the Hobbs Act's time limit to be jurisdictional. *Natural Resources Defense Council* v. *NRC*, 666 F.2d 595, 601-602 (D.C. Cir. 1981); *Geller* v. *FCC*, 610 F.2d 973, 977-978 (D.C. Cir. 1979); *New York* v. *United States*, 568 F.2d 887, 892 (2d Cir. 1977); *Chem-Haulers, Inc.* v. *United States*, 536 F.2d 610, 613-614 (5th Cir. 1976); *Microwave Communications, Inc.* v. *FCC*, 515 F.2d

385, 389-390 (D.C. Cir. 1974). See also *Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 72 (1970).

The better view, and one more consistent with Congressional intent, was recently stated by the Fifth Circuit: an agency "should not be compelled to defend the same regulation against identical attacks in successive enforcement actions, when those challenges could and should have been asserted in the period for pre-enforcement review." *RSR Corp.* v. *Donovan*, 747 F.2d 294, 301 (1984).

The mechanism for judicial review prescribed in the Hobbs Act provides parties with due process (cf. *Yakus* v. *United States*, 321 U.S. 414, 431-443 (1944)), while ensuring the efficient operation of administrative agencies. Parties against whom subsequent enforcement proceedings are brought are not bereft of defenses: they may challenge the application of a rule to the particular facts and they may challenge the constitutionality of the *statute* upon which the rule is based (see *Johnson* v. *Robison*, 415 U.S. 361 (1974)). In addition, should circumstances warrant, parties may petition the agency to reconsider its rule in light of subsequent developments, such as recent legislation. *E.g.*, *Investment Co. Institute* v. *Board of Governors*, 551 F.2d 1270, 1281-1282 (D.C. Cir. 1977).

All that the Hobbs Act precludes are untimely challenges to the validity of the rule itself, challenges that could and should be brought within 60 days in the court of appeals with exclusive jurisdiction. Any other procedural regime would promote delay and piecemeal litigation—all to the detriment of the finality and certainty Congress intended.

4. In this case, the Eighth Circuit ultimately rejected respondents' substantive contentions and upheld the agency orders. It can therefore be expected that respondents will urge the Court not to grant our petition because the government generally prevailed in the court of appeals.[12]

The judgment of the court of appeals—"affirming" the Commission—was incorrect. It should have entered a dismissal of the petition for lack of jurisdiction. Nor is the change we seek in the judgment solely academic. Even in this case, there is a risk of further improper proceedings if the jurisdictional holding remains undisturbed, *i.e.*, review of the *merits* by this Court on a petition filed by respondents. Moreover, if the ruling of the court below stands, there is the real prospect that other courts of appeals will feel free to entertain challenges to the substantive validity of this same ICC rule.[13] And, for the indefinite future—

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[12] This Court has jurisdiction to grant this petition for a writ of certiorari. The present case is indistinguishable in principle from *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980) and *NRC* v. *Lorion*, No. 83-1031 (Mar. 20, 1985), in which the Court granted certiorari although the petitioners had "prevailed" in the courts below, in that the court had rebuffed a challenge to an administrative action, albeit on the erroneous ground that it lacked jurisdiction. See 28 U.S.C. 1254(1) (petition may be filed by "any party" in lower court); *Director, OWC* v. *Perini North River Associates*, 459 U.S. 297, 304 & n.13 (1983); *United States* v. *Nixon*, 418 U.S. 683, 692 & n.7 (1974); see also *Menominee Tribe* v. *United States*, 391 U.S. 404, 407 (1968) (petitioners as well as the government sought affirmance).

[13] See *Texas* v. *United States*, 730 F.2d 409, 415 (1984), amended on reh'g, 749 F.2d 1144 (5th Cir. 1985); cf. *Arizona Public Service Co.* v. *United States*, 742 F.2d 644, 648-649 (D.C. Cir. 1984); *Montana* v. *Clark*, 749 F.2d 740, 744 n.8 (D.C. Cir. 1984).

until every court of appeals has sustained the rule—uncertainty will prevail and litigation will abound. The resulting burdens, for the government and for the courts, warrant this Court's intervention without further delay.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1985

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 83-2564

TRI-STATE MOTOR TRANSIT CO., and AMERICAN TRUCKING ASSOCIATIONS, INC., PETITIONERS

v.

INTERSTATE COMMERCE COMMISSION and UNITED STATES OF AMERICA, RESPONDENTS

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, INTERVENOR/RESPONDENT

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, INTERVENORS

On Petition for Review of the Order of the Interstate Commerce Commission

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Submitted: May 17, 1984

Filed: August 3, 1984

Before LAY, Chief Judge, FLOYD R. GIBSON, Senior Circuit Judge, and FAGG, Circuit Judge.

LAY, Chief Judge.

Tri-State Motor Transit Co. (Tri-State) contested the application before the Interstate Commerce Commission (ICC) of unrestricted motor carrier operations for the Denver and Rio Grande Western Railroad Co. American Trucking Associations, Inc. (ATA) and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Teamsters) unsuccessfully sought to intervene before the ICC in opposition of the application. Tri-State, ATA, and the Teamsters now ask this court to set aside the ICC's grant to Denver/Rio Grande of unrestricted motor carrier operations. We affirm the order of the ICC.[1]

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[1] ICC and Denver/Rio Grande argue that Tri-State et al. are estopped from challenging the Commission's order on the basis of collateral estoppel. ATA and the Teamsters very well may be estopped from such a challenge based on their participation in a similar challenge of the same issue before the Fifth Circuit. *American Trucking Ass'ns, Inc. v. I.C.C.*, 722 F.2d 1243 (5th Cir. 1984). Additionally, Tri-State may be estopped because of its privity with ATA; Tri-State is a member of the Association. *Western Coal Traffic League v. I.C.C.*, Nos. 82-1837 et al., at 7 (D.C. Cir. May 22, 1984), supports this view. Since we approve the grant of the certificate, we need not pass on the estoppel argument.

We also find no abuse of discretion in the ICC's denial of intervention for ATA and the Teamsters in the ICC proceeding. The decision whether to grant a petition to intervene before the ICC is governed by statute, 49 U.S.C. § 10922(b)(7), and by regulation, 49 C.F.R. § 1112.4. The latter states that intervention "may" be granted so long as it does not unduly disrupt or broaden the issues raised in the proceeding. In denying leave to intervene, the ICC stated:

> The ATA and Teamsters had the opportunity to appear when this proceeding was commenced and prior to the decision by the Review Board. They did not choose to

The unrestricted motor carrier operations granted to Denver/Rio Grande allows the railroad to engage in unlimited trucking operations. Historically, the ICC restricted rail-affiliated motor carriers to operations "auxiliary to or supplemental of" the rail operations of the company, unless the particular rail-affiliated trucking company could demonstrate special circumstances justifying an exception to the general rule. This general rule and exception thereto was known as the "special circumstances doctrine," and required that motor carrier operating authority for railroads be restricted to incidental rail service unless unrestricted authority was required to fulfill a compelling public need for service not being offered by independent motor carriers. The purpose of the special circumstances doctrine was to prevent rail domination of motor carrier markets.

In 1982 the ICC abrogated the special circumstances doctrine in Ex Parte No. MC-156, *Application for Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 M.C.C. 978 (1982). This decision was made in light of amendments to the Interstate Commerce Act—the Motor Carrier Act of

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do so. Furthermore, the apparent purpose of intervening in this proceeding is to attack the validity of the elimination of the "special circumstances" doctrine. This would unduly broaden the issues raised in this proceeding contrary to our rules of practice [49 C.F.R. 1112.4] and in effect constitutes a collateral attack on Ex Parte No. MC-156. As such, petitioners raise no issues that can properly be considered here. We will deny the petitions of ATA and Teamsters to intervene. Petitioners' interests will not be prejudiced inasmuch as their concerns will be addressed by the Court of Appeals [for the Fifth Circuit].

Interstate Commerce Commission Decision No. MC-166474 (Sub-No. 1) (Nov. 8, 1983). We find no error in this ruling.

1980 and the Staggers Rail Act of 1980. The ICC concluded that, in light of the 1980 amendments, a rail-affiliated trucking company no longer needs to prove special circumstances to justify an unrestricted grant of authority. ATA and the Teamsters unsuccessfully challenged the ICC decision before the Fifth Circuit. *American Trucking Associations v. I.C.C.*, 722 F.2d 1243 (5th Cir. 1984). The Fifth Circuit concluded that the ICC was within its authority when it abolished the special circumstances doctrine, noting especially the changes in the trucking and rail industries and the Interstate Commerce Act.

On appeal to this court, Tri-State, ATA, and the Teamsters argue that the Interstate Commerce Act precludes the ICC from removing all special limitations on the licensing of railroads to engage in motor transportation. Therefore, contends Tri-State et al., the ICC was without authority to remove the special circumstances doctrine from its licensing procedure, and the Fifth Circuit was in error in affirming the ICC decision.[2]

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[2] The ICC argues that, considering the Fifth Circuit's affirmance of Ex Parte No. MC-156, this court does not have jurisdiction to review a subsequent challenge on the substantive validity of an agency's rules. This argument is based on the Hobbs Act, which provides that a party aggrieved by a rule, regulation, or final order of the ICC must file a petition for judicial review within sixty days. 28 U.S.C. §§ 2342, 2344. We agree that this rule now precludes an attack on the procedure by which the policy was adopted. However, we hold that the Hobbs Act does not bar judicial review on the substantive validity of the rule, even if more than sixty days have elapsed since its issuance. As the District of Columbia and Fifth Circuits have noted, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny

The Fifth Circuit extensively reviewed the history of the special circumstances doctrine in its opinion. *See* 722 F.2d at 1244-47. The central issue there, and here, is whether the special circumstances doctrine, which was created by the ICC, has been recognized by the Supreme Court to be statutorily required. Prior to the passage of the Motor Carrier Act of 1935, the trucking industry was economically unstable and dominated by ease of competitive entry. The special circumstances rule arose from the Act itself and was intended to protect the motor transportation system from over competition.

The explicit Congressional restriction on rail-affiliated trucking companies was the enactment of high barriers to rail companies' *acquisition* of trucking companies. Motor Carrier Act of 1935, § 213(a), currently at 49 U.S.C. § 11344(c).[3] The implicit Congressional restriction was recognizing and preserving "the inherent advantages" of each mode of transportation. Motor Carriers Act of 1935, § 202 (a), currently at 49 U.S.C. § 10101(a). In contrast

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many parties ultimately affected by a rule an opportunity to question its validity." *Texas v. United States*, 730 F.2d 409, 415 (5th Cir. 1984) (quoting *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959)).

[3] Section 11344(c) provides in pertinent part:

> When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transportation involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition.

to the acquisition provisions, the licensing provisions did not provide for any restrictions on rail companies' operations of trucking companies. However, the ICC interpreted the acquisition provisions of § 11344 (c) to mean that not only could railroads not acquire, but that they could not operate as unrestricted trucking companies. The ICC additionally interpreted the National Transportation Policy's requirement of preserving the inherent advantages of each mode as support for protection of the infant trucking industry from the railroads. In *I.C.C. v. Parker*, 326 U.S. 60 (1945), and later in *United States v. Rock Island Co.*, 340 U.S. 419 (1951), the Supreme Court affirmed the ICC's power to restrict the licensing of rail-affiliated trucking companies.

The ICC modified its restrictions on the licensing of trucking operations for rail companies in *Rock Island Motor Transit Co. Common Carriers Application*, 63 M.C.C. 91 (1954). The ICC held that unrestricted authority could be granted to a rail-affiliated trucking company if the rail affiliate could prove that the grant would not restrain competition and that the public interest required the proposed service. This policy was the "special circumstances" exception and the Supreme Court affirmed its use in *American Trucking Associations v. United States*, 355 U.S. 141 (1957). The Supreme Court noted that the licensing and acquisitions sections were interpretive brothers, and stated that "the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.'" *Id.* at 151-52.

In *American Trucking Associations v. United States*, 364 U.S. 1 (1960), the ICC had granted operating licenses to a trucking company that was a wholly owned subsidiary of a railroad. ATA chal-

lenged the grant, claiming that the ICC did not properly apply the special circumstances doctrine. The Supreme Court agreed, finding that "[b]oth the Commission and this Court have recognized that Congress has expressed a strong general policy against railroad invasion of the motor field," *id.* at 6, and concluding that the ICC had deviated from this policy by granting operating authority to a railroad subsidiary without finding special circumstances. *Id.* at 15.

Tri-State now urges that the principles of *American Trucking* are violated by the ICC's grant of operating licenses to the Denver/Rio Grande. We must disagree. The ICC was charged by the Supreme Court with applying the Act "as a whole." We believe that when the Act is read as a whole, including the 1980 amendments, the ICC had proper authority to find that the special circumstances doctrine should no longer be recognized.

Specifically, the amendments established "a new Federal policy which is designed to promote a competitive and efficient motor carrier industry." H.R. Rep. No. 1069, 96th Cong., 2d sess. 14 (1980). The legislation mandated eased regulatory entry requirements in order to increase "opportunities for new carriers to get into the trucking business and for existing carriers to expand their services." *Id.* at 3. However, Congress found that "today most transportation is competitive and many Government regulations affecting railroads have become unnecessary and inefficient." H.R. Rep. No. 1430, 96th Cong., 2d sess. 79 (1980). *See generally American Trucking Associations v. I.C.C.*, 722 F.2d 1243, 1249-52 (5th Cir. 1984) (detailing the deregulatory approach of the 1980 amendments). We therefore agree with the ICC and the Fifth Circuit *ATA* decision, *id.*, that the

showing required under the special circumstances doctrine of compelling necessity for unrestricted authority for rail-affiliated motor carriers has no place in the procompetitive licensing regulations of the revised Interstate Commerce Act.

For the above reasons, the decision of the ICC is affirmed.

A true copy:

Attest:

Clerk, U.S. Court of
Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1983

No. 83-2564

TRI STATE MOTOR TRANSIT CO., ET AL, PETITIONERS

vs.

ICC & U.S.A., RESPONDENTS

Petition for Review of Order of
Interstate Commerce Commission

JUDGMENT

This cause came to be submitted on the record from the Interstate Commerce Commission and briefs of the parties.

After consideration, it is ordered and adjudged that the judgment of the Interstate Commerce Commission, is hereby, affirmed in accordance with the opinion of this Court.

August 3, 1984

A true copy:

Attest:

/s/ Robert D. St. Vrain
Clerk,
U.S. Court of Appeals,
Eighth Circuit. 11/7/84

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1984

No. 83-2564.

TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,
PETITIONERS

vs.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA, RESPONDENTS

Petition for Review of Order of the
Interstate Commerce Commission

Respondents' petition for rehearing en banc has been considered by the Court and is denied.

Petition for rehearing by the panel is also denied.

October 26, 1984

APPENDIX D

Service Date

Sept. 8, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-166474 (Sub-No. 1)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY EXTENSION—
POINTS IN THE UNITED STATES
(Denver, CO)

Decided: August 26, 1983

Applicant seeks a certificate authorizing the operations described in the appendix. The evidence has been considered under the modified procedure. Tri-State Motor Transit Co., opposes the application.

Applicant holds no existing authority from this Commission. It argues that a grant of the proposed authority will enhance the competitive environment and will promote a safe and sound intermodal transportation system.

The application is supported by 27 shippers. They are The John Sexton Co., Morton Salt Division of Morton Thiokol, Inc., The Quaker Oats Company, and Gee Co., all of Chicago, IL; Packaging Corporation of America of Evanston, IL; Grain Processing Corporation of Muscatine, IA; F. Korbel and Brothers of Guerneville, CA; American Timber Products, Inc., of Oklahoma City, OK; Nobel/Sysco Food Services Co., Association Grocers of Colorado, Inc., Keebler Com-

pany and McKesson Wine and Spirits Co., all of Denver Co.; American Excelsior Corp. of Arlington, TX; Alpine Lumber Co. and Husky Oil Company of Englewood, CO; Pacific Coast Producer's of Santa Clara, CA; Slaughter Brothers, Inc. and Lennox Industries, Inc., of Dallas, TX; Alamaden Vineyards of San Jose, CA; The Dorris Lumber & Mouldings Co. and Western Bark Sales, Inc., of Sacramento, CA; Trammell Crow Distributions Corporation and National Distribution Systems of Clearfield, UT; Gonzalez & Company, Inc., of Gonzalez, CA; Gerber Products Company of Fremont, MI; American Forest Products Co., and United Vinters Inc., of San Francisco, CA. Collectively, shippers require service on a wide variety of commodities including air conditioners, foods and food products, boxes, pulpwood and paper products, cleaning compounds, plastic articles, wines, lumber and lumber products and appliances. All of the shippers have described the commodities to be transported, the volume to be tendered applicant, and problems with existing service. Representative origin and destination points are shown by most of the shippers. Others indicate customers are located throughout the 48 contiguous States. A number of shippers require insulated equipment, while several require high cube van equipment. A large number of shippers support the instant application in order to shift transportation services from rail to motor common carriage. Shippers currently using motor common carriers generally express a need to have additional equipment available and an opportunity to use a carrier with a more competitive rate structure.

Tri-State holds authority to transport general commodities between points in the United States, operates 1,164 tractors and 2,585 trailers, and contends that

a grant of this application would have a detrimental effect upon its operations. Tri-State, in 1982, generated approximately $64 million in revenue which assertedly would be subject to diversion by a grant of the application. Protestant claims that the diversion of any meaningful portion of this traffic would have a disastrous effect upon its operations; it suffered a loss of $799.00 in 1982. Tri-State notes that its traffic was down 20 percent in 1982, that it currently had idle equipment throughout its system, and it attributes this decrease in business to the more liberal entry policy of the Commission. Further diversion and lack of traffic, we are told, will result in further closing of terminals and additional layoffs of personnel. It believes that the application should be denied in view of applicant's failure to provide "special circumstances".

On the record before us, we find that applicant has met its threshold burden. A representative showing is all that is required, and the specific commodities, origins and destinations named are sufficiently representative of the authority sought by the 27 supporting shippers.

Tri-State has not shown that a grant of authority to applicant would harm its overall operations to an extent injurious to the public interest. So long as it provides reasonable service and competitive rates, there is no reason to assume that its traffic would be diverted by applicant. Furthermore, Tri-State has done little to show that a grant of the application would be inconsistent with the public convenience and necessity, merely citing potentially divertible traffic and revenues from increased competition. This factor, in and of itself, cannot, under the Motor Carrier Act of 1980, be made the basis for a denial

of authority otherwise adequately supported by the record.

Finally, contrary to protestant's contentions, a railroad need no longer demonstrate "special circumstances" in order to obtain unrestricted motor carrier authority. *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982).

We find:

Performance by applicant of the service described in the appendix will serve a useful public purpose, responsive to a public demand or need. Applicant is fit, willing and able properly to perform the granted service and to conform to statutory and administrative requirements. This action will not significantly affect either the quality of the human environment or conservation of energy resources. An appropriate certificate should be granted.

It is ordered:

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a *certificate* and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

Compliance with these requirements must be made within 90 days after the date of service of this decision or the grant of authority shall be void.

By the Commission, the Review Board, Members Carleton, Parker, and Krock.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii).

APPENDIX E

Service Date

Nov. 15, 1983

INTERSTATE COMMERCE COMMISSION

DECISION

No. MC-166474 (Sub-No. 1)

THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY, EXTENSION—POINTS IN THE UNITED STATES (Denver, CO)

Decided: November 8, 1983

We have considered the application and the record in this proceeding, the appeal filed by protestant Tri-State Motor Transit Co., the petitions to intervene filed by American Trucking Associations, Inc. (ATA) and the International Brotherhood of Teamsters, Chauffeurs, Warehouseman and Helpers of America (Teamsters), and applicant's reply.

The ATA and Teamsters here renew their challenge to the legality of the elimination of the "special circumstances" doctrine in Ex Parte No. MC-156, *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (1982).[1] This issue is pending before the

[1] The "special circumstances" doctrine allowed a departure from the requirement of imposing auxillary-to-rail restrictions on motor carrier authority issued to railroads or rail affiliates in licensing proceedings. The doctrine allowed issuance of unrestricted authority where the rail affiliated applicant could show a "compelling need" for its service by demonstrating (1) that a grant of unrestricted authority would not

United States Court of Appeals for the Fifth Circuit in *American Trucking Associations, et al. v. I.C.C., et al.*, No. 83-4039. They contend that they should be allowed to intervene in this proceeding in order to "maintain the integrity of the licensing procedures" of this Commission and compliance with "the regulatory scheme set forth by Congress in the Interstate Commerce Act."

The ATA and Teamsters had the opportunity to appear when this proceeding was commenced and prior to the decision by the Review Board. They did not choose to do so. Furthermore, the apparent purpose of intervening in this proceeding is to attack the validity of the elimination of the "special circumstances" doctrine. This would unduly broaden the issues raised in this proceeding contrary to our rules of practice [49 C.F.R. 1112.4.] and in effect constitutes a collateral attack on Ex Parte No. MC-156. As such, petitioners raise no issues that can properly be considered here. We will deny the petitions of ATA and Teamsters to intervene. Petitioners' interests will not be prejudiced inasmuch as their concerns will be addressed by the Court of Appeals.

By decision served September 8, 1983, the Review Board granted applicant's request to transport general commodities (except classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii). The Board held that a railroad need no longer demonstrate "special circumstances" in order

---

result in undue restraint of competition, and (2) that the public interest requires the proposed operation which was not being furnished by independent motor carriers. Ex Parte No. MC-156, *supra*, at 981. The doctrine was eliminated to make it easier for railroads and rail affiliates to obtain unrestricted motor carrier authority.

to obtain unrestricted motor carrier authority, citing Ex Parte No. MC-156, *supra.*

Protestant does not challenge whether applicant has met the criteria of 49 U.S.C. 10922 or established a need for the proposed service. Rather, it contends that the authority should not be granted since applicant failed to establish "special circumstances." Protestant is concerned that the granting of this application will result in the filing of similar applications by other rail carriers and their affiliates while the review of Ex Parte No. MC-156 is pending in Court. It requests us to (1) issue a notice or order that, pending final decision by the Court, applications filed under Ex Parte No. MC-156 will be held in abeyance or not accepted for filing until further order; or (2) attach a condition limiting any certificates granted in those proceedings to the lesser of (a) a term of one year from its issuance, or (b) reconsideration of the proceeding based on the final decision by the Court.

The Fifth Circuit Court of Appeals has not issued a stay of the rules in Ex Parte No. MC-156 pending its reivew of that proceeding. Accordingly, there is no legal impediment to rendering a decision in this application proceeding. We see no valid reason to either hold this case or other similar cases in abeyance or to impose a condition on the certificates to be issued. Ex Parte No. MC-156 is quite clear that a railroad need no longer demonstrate "special circumstances." Therefore, we will not reverse the Review Board decision. For reasons stated above protestant's attack on the validity of the elimination of the "special circumstances" doctrine constitutes an inappropriate issue to consider here.

The Review Board correctly found that applicant has established a need for the proposed service. The

application is supported by 27 shippers which require service for a wide variety of commodities throughout the 48 contiguous states. Those using motor carriers expressed a need to have more service available. Only one protestant opposed the application. Protestant did not show that a grant of the application would be inconsistent with the public convenience and necessity.

The grant of the requested authority will allow improved and innovative service through the combined use of piggyback, motor, and rail service by one carrier. In addition to promoting intermodal service, the granted authority should afford shippers a new and efficient service option.

It is ordered:

The petitions to intervene of the American Trucking Associations, Inc., and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America are denied.

Protestant's appeal is denied because the findings of the Review Board, are in accordance with the evidence and the applicable law.

The application is granted to the extent set forth in the appendix. Operations may begin only following the service of a certificate and upon compliance with the following requirements set forth in the Code of Federal Regulations: insurance (49 CFR 1043), designation of process agent (49 CFR 1044), and tariffs (49 CFR 1310).

Compliance with these requirements must be made within 90 days after the date of service of this decision or the grant of authority shall be void.

This decision will take effect 25 days from its date of service.

By the Commission, Division 1, Acting as an Appellate Division, Commissioners Andre, Taylor, and Sterrett. Commissioner Taylor is assigned to this Division for the purpose of resolving tie votes. Since there was no tie in this matter, Commissioner Taylor did not participate.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX

Authority to conduct the following operations will be issued in an appropriate document. This decision does not constitute authority to operate.

To operate as a *common carrier*, by motor vehicle, in interstate or foreign commerce, over irregular routes, transporting *general commodities* (except classes A and B explosives, household goods, and commodities in bulk), between points in the United States (except Alaska and Hawaii).

APPENDIX F

Title 28, United States Code

CHAPTER 158—ORDERS OF FEDERAL AGENCIES; REVIEW

§ 2341. Definitions

As used in this chapter—

(1) "clerk" means the clerk of the court in which the petition for the review of an order, reviewable under this chapter, is filed;

(2) "petitioner" means the party or parties by whom a petition to review an order, reviewable under this chapter, is filed; and

(3) "agency" means—

(A) the Commission, when the order sought to be reviewed was entered by the Federal Communications Commission, the Federal Maritime Commission, the Interstate Commerce Commission, or the Atomic Energy Commission, as the case may be;

(B) the Secretary, when the order was entered by the Secretary of Agriculture; and

(C) the Administration, when the order was entered by the Maritime Administration.

§ 2342. Jurisdiction of court of appeals

The court of appeals (other than the United States Court of Appeals for the Federal Circuit) has exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), or to determine the validity of—

(1) all final orders of the Federal Communications Commission made reviewable by section 402(a) of title 47;

(2) all final orders of the Secretary of Agriculture made under chapters 9 and 20A of title 7, except orders issued under sections 210(e), 217a, and 499g(a) of title 7;

(3) such final orders of the Federal Maritime Commission or the Maritime Administration entered under chapters 23 and 23A of title 46 as are subject to judicial review under section 830 of title 46;

(4) all final orders of the Atomic Energy Commission made reviewable by section 2239 of title 42; and

(5) all rules, regulations, or final orders of the Interstate Commerce Commission made reviewable by section 2321 of this title and all final orders of such Commission made reviewable under section 11190(i)(2) of title 49, United States Code.

Jurisdiction is invoked by filing a petition as provided by section 2344 of this title.

§ 2343. Venue

The venue of a proceeding under this chapter is in the judicial circuit in which the petitioner resides or has its principal office, or in the United States Court of Appeals for the District of Columbia Circuit.

§ 2344. Review of orders; time; notice; contents of of petition; service

On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules.

Any party aggrieved by the final order may within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. The action shall be against the United States. The petition shall contain a concise statement of—

(1) the nature of the proceedings as to which review is sought;

(2) the facts on which venue is based;

(3) the grounds on which relief is sought; and

(4) the relief prayed.

The petitioner shall attach to the petition, as exhibits, copies of the order, report, or decision of the agency. The clerk shall serve a true copy of the petition on the agency and on the Attorney General by registered mail, with request for a return receipt.

§ 2345. Prehearing conference

The court of appeals may hold a prehearing conference or direct a judge of the court to hold a prehearing conference.

§ 2346. Certification of record on review

Unless the proceeding has been terminated on a motion to dismiss the petition, the agency shall file in the office of the clerk the record on review as provided by section 2112 of this title.

§ 2347. Petitions to review; proceedings

(a) Unless determined on a motion to dismiss, petitions to review orders reviewable under this chapter are heard in the court of appeals on the record of the pleadings, evidence adduced, and proceedings before the agency, when the agency has held a hearing whether or not required to do so by law.

(b) When the agency has not held a hearing before taking the action of which review is sought by

the petition, the court of appeals shall determine whether a hearing is required by law. After that determination, the court shall—

(1) remand the proceedings to the agency to hold a hearing, when a hearing is required by law;

(2) pass on the issues presented, when a hearing is not required by law and it appears from the pleadings and affidavits filed by the parties that no genuine issue of material fact is presented; or

(3) transfer the proceedings to a district court for the district in which the petitioner resides or has its principal office for a hearing and determination as if the proceedings were originally initiated in the district court, when a hearing is not required by law and a genuine issue of material fact is presented. The procedure in these cases in the district court is governed by the Federal Rules of Civil Procedure.

(c) If a party to a proceeding to review applies to the court of appeals in which the proceeding is pending for leave to adduce additional evidence and shows to the satisfaction of the court that—

(1) the additional evidence is material; and

(2) there were reasonable grounds for failure to adduce the evidence before the agency;

the court may order the additional evidence and any counter evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken, and may modify or set aside its order, and shall file in the court the

additional evidence, the modified findings or new findings, and the modified order or the order setting aside the original order.

§2348. Representation in proceeding; intervention

The Attorney General is responsible for and has control of the interests of the Government in all court proceedings under this chapter. The agency, and any party in interest in the proceeding before the agency whose interests will be affected if an order of the agency is or is not enjoined, set aside, or suspended, may appear as parties thereto of their own motion and as of right, and be represented by counsel in any proceeding to review the order. Communities, associations, corporations, firms, and individuals, whose interests are affected by the order of the agency, may intervene in any proceeding to review the order. The Attorney General may not dispose of or discontinue the proceeding to review over the objection of any party or intervenor, but any intervenor may prosecute, defend, or continue the proceeding unaffected by the action or inaction of the Attorney General.

§ 2349. Jurisdiction of the proceeding

(a) The court of appeals has jurisdiction of the proceeding on the filing and service of a petition to review. The court of appeals in which the record on review is filed, on the filing, has jurisdiction to vacate stay orders or interlocutory injunctions previously granted by any court, and has exclusive jurisdiction to make and enter, on the petition, evidence, and proceedings set forth in the record on review, a judgment determining the validity of, and enjoining, setting aside, or suspending, in whole or in part, the order of the agency.

(b) The filing of the petition to review does not of itself stay or suspend the operation of the order of the agency, but the court of appeals in its discretion may restrain or suspend, in whole or in part, the operation of the order pending the final hearing and determination of the petition. When the petitioner makes application for an interlocutory injunction restraining or suspending the enforcement, operation, or execution of, or setting aside, in whole or in part, any order reviewable under this chapter, at least 5 days' notice of the hearing thereon shall be given to the agency and to the Attorney General. In a case in which irreparable damage would otherwise result to the petitioner, the court of appeals may, on hearing, after reasonable notice to the agency and to the Attorney General, order a temporary stay or suspension, in whole or in part, of the operation of the order of the agency for not more than 60 days from the date of the order pending the hearing on the application for the interlocutory injunction, in which case the order of the court of appeals shall contain a specific finding, based on evidence submitted to the court of appeals, and identified by reference thereto, that irreparable damage would result to the petitioner and specifying the nature of the damage. The court of appeals, at the time of hearing the application for an interlocutory injunction, on a like finding, may continue the temporary stay or suspension, in whole or in part, until decision on the application. The hearing on an application for an interlocutory injunction shall be given preference and expedited and shall be heard at the earliest practicable date after the expiration of the notice of hearing on the application. On the final hearing of any proceeding to review any order under this chapter, the same requirements as to precedence and expedition apply.

§ 2350. Review in Supreme Court on certiorari or certification

(a) An order granting or denying interlocutory injunction under section 2349(b) of this title and a final judgment of the court of appeals in a proceeding to review under this chapter are subject to review by the Supreme Court on a writ of certiorari as provided by section 1254(1) of this title. Application for the writ shall be made within 45 days after entry of the order and within 90 days after entry of the judgment, as the case may be. The United States, the agency, or an aggrieved party may file a petition for a writ of certiorari.

(b) The provisions of section 1254(3) of this title, regarding certification, and of section 2101(f) of this title, regarding stays, also apply to proceedings under this chapter.

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No. 84-1515

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION AND
UNITED STATES OF AMERICA,
Petitioners

v.

TRI-STATE MOTOR TRANSIT CO., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR TRI-STATE MOTOR TRANSIT CO., *ET AL.* IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1515

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA,
Petitioners

v.

TRI-STATE MOTOR TRANSIT CO., *et al.*,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF FOR TRI-STATE MOTOR TRANSIT CO., *ET AL.* IN OPPOSITION

STATEMENT

This brief in opposition is filed by Tri-State Motor Transit Co. ("Tri-State"), American Trucking Associations, Inc. ("ATA"), and International Brotherhood of Teamsters, Etc. ("IBT").

The petition of the Interstate Commerce Commission ("ICC") and the United States (hereafter jointly "the government") is brought to review the same judgment of the Court of Appeals which is the subject of the petition for certiorari in No. 84-1518 filed by Tri-State, ATA

and IBT. That judgment affirmed a decision of the ICC granting to respondent Denver & Rio Grande Western Railroad Company ("Rio Grande") an unrestricted license to engage in motor carrier operations. The ICC proceedings are described at Pet. 4-5 [1] and more fully in our petition in No. 84-1518, pp. 8-10, to which we respectfully call the Court's attention. Specifically, the license was challenged by Tri-State on the ground that because the applicant, Rio Grande, is a railroad, any motor carrier operating license issued to it should be restricted to operations "auxiliary and supplemental to" the Rio Grande's railroad operations absent a showing of "special circumstances" which render that restriction unnecessary to the public interest.

Beginning in 1938 the ICC had imposed such restrictions on railroad carriers and their affiliates in accordance with what has been known as the "special circumstances" doctrine, see Pet. for Cert. in No. 84-1518, pp. 3-6, which, as we urge, *id.* at 10-15, was ratified by Congress in 1940 and approved as Congressional policy by this Court. However, the ICC abolished the "special circumstances" doctrine in a final Policy Statement issued in Ex Parte No. MC-156, *Motor Carrier Operating Authority—Railroads*, 132 M.C.C. 978 (served January 6, 1983), affirmed in *American Trucking Associations, Inc.* v. *ICC*, 722 F.2d 1243 (C.A. 5), cert. den., 53 U.S.L.W. 3324 (1984).

The ICC overruled Tri-State's objection to the unrestricted certificate on the basis of that Policy Statement. See Pet. 14a-16a. On a petition for review filed by Tri-State and ATA and joined by IBT as intervenor, the Eighth Circuit affirmed the order granting unrestricted operating authority to the Rio Grande. That Court held,

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[1] "Pet." will refer to the government's petition for a writ of certiorari in this case, No. 84-1515. The petition for certiorari filed by the present respondents, Tri-State, ATA and IBT, will be referred to as "Pet. No. 84-1518".

in agreement with the Fifth Circuit in *American Trucking Associations* that the ICC acted within its authority when it abandoned the "special circumstances" doctrine. (See Pet. 6; Pet. No. 84-1518, 9-10.) It therefore entered an order *affirming* the decision of the ICC (Pet. 8a, 9a.) The government parties petitioned for rehearing en banc on the Hobbs Act issue they renew here. The petition was denied. (Pet. 10a.)

I. BECAUSE THE GOVERNMENT PREVAILED ON THE MERITS BELOW, ITS PETITION DOES NOT PROPERLY INVOKE THIS COURT'S JURISDICTION.

(a) The government correctly anticipates "that respondents will urge the Court not to grant [its] petition because the government generally prevailed in the court of appeals." (Pet. 13.) Indeed, the characterization "generally" is too modest an assessment of the government's success below. The case was before the Court of Appeals on a petition for review by Tri-State and the ATA; the IBT intervened in support of that petition. The Court of Appeals, overruling the jurisdictional contention which the government seeks to renew here, reached the merits, and on the merits sustained the Commission's order. It therefore dismissed the petition for review in its entirety. The practical effect on the parties to this litigation of the difference between the court's order "affirming" and the "dismissal for lack of jurisdiction" which the government prefers (and which it wishes this Court to require the court below to enter) is exactly nil. Under either form of order the Commission's underlying decision granting the challenged license to respondent Rio Grande would be sustained so that Tri-State and the other objecting parties would be left without any judicial recourse. If there were any possible practical differences between the outcome in the court below and the order which the Government urges that that court should have entered, respondent Rio Grande would be supporting or opposing the

government's petition, rather than asserting neutrality, as it has. The government could not have prevailed more completely. For this reason the government's petition does not properly invoke the jurisdiction of this Court.

(b) In *Deposit Guaranty Nat. Bank* v. *Roper*, 445 U.S. 326 (1980), this Court wrote:

> Ordinarily, only a party aggrieved by a judgment or order of a district court may exercise the statutory right to appeal therefrom. A party who receives all that he has sought generally is not aggrieved by the judgment affording the relief and cannot appeal from it. *Public Service Comm'n* v. *Brashear Freight Lines, Inc.*, 306 U.S. 204 (1939); *New York Telephone Co.* v. *Maltbie*, 291 U.S. 645 (1934); *Corning* v. *Troy Iron & Nail Factory*, 15 How. 451 (1854); 9 J. Moore, Federal Practice ¶ 203.06 (2d ed. 1975). The rule is one of federal appellate practice, however, derived from the statutes granting appellate jurisdiction and the historic practices of the appellate courts; it does not have its source in the jurisdictional limitations of Art. III. In an appropriate case, appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Art. III. [445 U.S. at 333-334] [2]

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[2] In *Roper*, the Court held that the court of appeals had jurisdiction to entertain an appeal from the denial of class certification taken by plaintiffs in a class action whose own individual claims had been terminated by the entry of the judgment in their favor in the full amount of the claim on the basis of a tender by the defendant. The district court's denial of class certification deprived the individual plaintiffs of their "continuing individual interest in the resolution of the class certification question in their desire to shift part of the costs of litigation to those who would share in its benefits if the class is certified and ultimately prevails." 445 U.S. at 336. Thus, they were aggrieved by that order, and there was a continuing live controversy with practical consequences depending on its outcome. It is this recognition of plaintiffs' separate interest in the viability of the claim of the class that preserved the *Roper* case for appellate review.

Roper involved an appeal from a district court to a court of appeals, but each of the cases cited in the foregoing passage involved the appellate jurisdiction of this Court. And while, by its reference to "any party" the literal language of 28 U.S.C. § 1254(1) is broad enough to encompass the successful winning party before the court of appeals, there is no indication that Congress contemplated that this Court' certiorari jurisdiction would differ so substantially from general federal appellate practice. As the Court explained in *United States* v. *Gulf Refining Co.*, 268 U.S. 542, 545 (1924): "The language, circumstances and history of the enactment [which added the phrase 'upon the petition of any party thereto'] make clear the intent of Congress to give this Court jurisdiction on the petition of the United States to bring up criminal cases on writ of certiorari."

We are informed by the leading treatise on practice in this Court that "while some winning parties have attempted to petition for certiorari, there appears to be no recorded instance where the Court has considered the problem or has granted a petition filed by a party who prevailed on the merits in the court of appeals." [3] None of the cases cited by the government supports its claim that jurisdiction exists. (Pet. 13, n.13.)

The government asserts that the

> present case is indistinguishable in principle from *Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980) and *NRC* v. *Lorion*, No. 83-1031 (Mar. 20, 1985), in which the Court granted certiorari al-

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[3] Stern and Gressman, *Supreme Court Practice* (5th ed., 1978), p. 58. While the treatise states neither that the Court would or would not have jurisdiction over a petition like that filed by the government here, it observes that "to entertain such a petition would seem to be inconsistent with the Court's settled refusal to entertain an appeal by a party successful in obtaining a final judgment in his favor in the lower court." (*Id.* at 59, citing cases.)

> though the petitioners had "prevailed" in the courts below, in that the court had rebuffed a challenge to an administrative action, albeit on the erroneous ground that it lacked jurisdiction. [Pet. 13, n.13] [4]

Neither the *Harrison* nor *Lorion* case discussed this Court's jurisdiction and those cases therefore have no precedential force on this subject. In any event, the reason why jurisdiction was proper in those cases (which are identical to each other in this regard), and why those cases differ fundamentally "in principle" from this case, is clear enough. The petitioning agencies in *Harrison* and *Lorion* were aggrieved by the judgments of the courts of appeals in those cases, because those judgments relegated the agencies to a different forum (a district court) to litigate the same controversy against the parties which had opposed the administrative orders.

Thus, the judgments of the courts of appeals were only formally favorable to the agencies (in the sense that they dismissed petitions for review of administrative orders), but in practical effect, were adverse to the agencies. It would have been a mere empty formalism to hold that the agencies could not seek review from those judgments, to obtain from this Court an order directing the court of appeals to assert its proper jurisdiction and decide the case on the merits.[5]

The other cases cited by the government likewise fail to support its assertion that there is jurisdiction over its petition. It was not contended in *Director, OWCP* v.

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[4] *NRC* v. *Lorion* was decided *sub nom. Florida Power & Light Co.* v. *Lorion*, No. 83-703, 53 U.S.L.W. 4360 (March 20, 1985).

[5] In this regard, *Harrison* and *Lorion* are much like *Roper* in that a question collateral to the merits, but with important practical consequences in the same litigation, had been decided against them.

Perini North River Associates, 459 U.S. 297 (1983), that the judgment of the court of appeals had been favorable to the Director. Indeed, that judgment was contrary to his actual position there. See 652 F.2d 255 at 258. Thus, the ruling that, as a party in the court below, he was a "party" entitled to seek certiorari under 28 U.S.C. § 1254(1) is not precedent for the government's position. In *Menominee Tribe* v. *United States*, 391 U.S. 404 (1968), the Court of Claims' judgment was adverse to the petitioning Tribe, whose suit for compensation was dismissed.[6]

In *United States* v. *Nixon*, 418 U.S. 683 (1974), the government sought certiorari before judgment in the court of appeals. It was the successful party *in the district court*, and the jurisdiction of the court of appeals had been invoked by the losing party in the district court, Mr. Nixon. To construe "any party" in 28 U.S.C. § 1254(1) to include the successful party in the *district court* where the court of appeals has rendered no judgment—as this Court did in *Nixon*, and in other cases in which the court of appeals has been thus bypassed—is necessary lest the losing party in the district court be empowered to control

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[6] The government's observation that in *Menominee Tribe* "petitioners as well as the government sought affirmance" is incomplete and misleading. The Court of Claims dismissed a suit brought by the Tribe to obtain compensation from the United States for the loss of rights under a treaty which the Wisconsin Supreme Court had previously held resulted from an Act of Congress. The result which the Tribe preferred was a ruling by this Court that those rights had not been lost, which would have meant that no compensation was due, and the judgment of the Court of Claims would be affirmed for that reason. However, the Tribe asserted that if it failed on that issue, compensation should be awarded, and the judgment of the Court of Claims reversed. A majority of this Court ultimately held in the Tribe's favor on the first point, therefore affirming; the dissenting justices would have held against the Tribe on that point but would have awarded compensation, therefore reversing.

the course of the litigation and frustrate this Court's immediate consideration of exceptionally important cases. But the practice of allowing immediate review of the district court judgment on certiorari at the request of either party differs totally from the practice which the government seeks to inaugurate by its petition in this case.[7]

(c) As the Court reiterated in *Roper*, *see* page 4, *supra*, even if there is statutory jurisdiction in the appellate court, there must also be a continuing "case or controversy" for purposes of Article III. The Court's Article III jurisdiction over the government's petition hangs on a thread—and that thread is the present respondents' petition in No. 84-1518. For this reason, as we shall show, this would be an especially inappropriate case in which to grant certiorari at the behest of a party which pre-

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[7] *See* Stern, *Appellate Practice in the United States* (1981), pp. 125-126:

> In the United States Supreme Court and a number of states, the procedure for bypassing the intermediate appellate court has one novel feature. The request or application may be made by the *winning* party below as well as the loser. The latter must first have taken an appeal to the intermediate appellate court, which requires docketing the appeal in that court. * * * After that has been done, however, either party may request that the appeal be transferred to a higher court. In the usual appellate situation to allow the winner to appeal from a decision in his favor, from which the loser was not appealing, might well present an issue as to the existence of a continuing justiciable case or controversy. But no such problem can arise when the practical effect of a request for immediate decision by the highest court is merely to transfer an appeal by a loser from one appellate court to another. [Footnotes omitted, emphasis in original.]

In a footnote to this passage, Mr. Stern reiterates the observations in the Supreme Court practice treatise (co-authored with Mr. Gressman) that 28 U.S.C. § 1254(1) literally permits a successful party in the court of appeals to seek certiorari, but that "[n]o case has been found * * * in which a victorious party was enabled to take an appeal in the first instance." (*Id.* at n.27.)

vailed fully in the court of appeals, even if 28 U.S.C. § 1254(1) authorizes such a petition.

In denying that the change which it seeks in the judgment of the court below is "solely academic", the government points only to the "risk of further improper proceedings if the jurisdictional holding remains undisturbed, *i.e.*, review of the *merits* by this court on a petition filed by respondents." (Pet. 13, emphasis in original.) But that "risk" is realistic, and the controversy between these parties remains alive only by virtue of the petition for certiorari which Tri-State, *et al.*, have filed in No. 84-1518 to review the judgment of the court below.

If that petition had not been filed, that risk would have been eliminated even in theory. So too, if the petition in No. 84-1518 is denied, as the government there urges, there will no longer be a case or controversy between the parties, for the present respondents, Tri-State, *et al.*, will no longer have any opportunity to obtain reversal of the ICC's order granting to respondent Rio Grande an unrestricted motor carrier operating certificate. On the other hand, if the petition in No. 84-1518 is granted, the government could obtain complete relief from the court of appeals' ruling on jurisdiction. The government can reassert its position that the court of appeals was without jurisdiction under the Hobbs Act, and this Court must, of course, decide that issue before reaching the merits of the Interstate Commerce Act issue which are raised by that petition. Whether the petition in No. 84-1518 is granted or denied, there is no risk whatsoever that there will be a "review of the *merits* by this court"—let alone a judgment favorable to the present respondents—without a prior adjudication of the Hobbs Act jurisdictional issue by this Court.

II. THE QUESTION RAISED BY THE GOVERNMENT'S PETITION IS INSUBSTANTIAL.

(a) On the merits the court of appeals' jurisdictional ruling is entirely correct, and accords with the law in the other circuits which have ruled on the issue.

In rejecting the government's argument that the Hobbs Act bars consideration of the legality of the policy which the ICC enunciated in Ex Parte No. MC-156, the court below reasoned:

> We agree that this rule now precludes an attack on the procedure by which the policy was adopted. However, we hold that the Hobbs Act does not bar judicial review on the substantive validity of the rule, even if more than sixty days have elapsed since its issuance. As the District of Columbia and Fifth Circuits have noted, "administrative rules and regulations are capable of continuing application; limiting the right of review of the underlying rule would effectively deny many parties ultimately affected by a rule an opportunity to question its validity." *Texas* v. *United States*, 730 F.2d 409, 415 (5th Cir. 1984) (quoting *Functional Music, Inc.* v. *FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958), *cert. denied*, 361 U.S. 813 (1959).) [Pet. 4a-5a, n.2]

As the *Texas* and *Functional Music* cases show, the Fifth and District of Columbia Circuits have also refused to confine substantive review of a rule to the statutory period immediately following its promulgation. In the *Texas case*, after the decision below issued, the Fifth Circuit denied the government respondents' petition for rehearing en banc on the Hobbs Act issue. Simultaneously the panel withdrew its original opinion and substituted an opinion which differs only in a presently immaterial respect, and again quotes the passage from *Functional Music* which the court below also adopted. (749 F.2d 1144, 1146-1147 (C.A. 5, January 7, 1985)). *Functional Music*, the leading case in the D.C. Circuit, has re-

peatedly been followed, *e.g.*, *Network Project* v. *FCC*, 511 F.2d 786, 789, n.1 (C.A. D.C. 1975); *Geller* v. *FCC*, 610 F.2d 973, 978 (C.A. D.C. 1979); *Montana* v. *Clark*, 749 F.2d 740, 744, n.8 (C.A. D.C. 1984). *Functional Music* has also been followed by the Seventh Circuit in *Illinois Central Gulf R. Co.* v. *I.C.C.*, 720 F.2d 958, 960-961 (1983).

(b) The government's assertion that "the procedure/substance distinction has no support in the case law" (Pet. 10), is wholly inaccurate. Indeed, in *Natural Resources Defense Council* v. *Nuclear Regulatory Commission*, 666 F.2d 595, 601-602 (C.A. D.C. 1981) (hereafter "*NRDC*"), cited at Pet. 9-10 and at Pet. 11, that distinction was expressly drawn; in dismissing the petition for review the court distinguished *Functional Music*, *supra*, and *Geller*, *supra*, on the precise ground that those cases involved claims of "*substantive invalidity*" (see *id.* at 602, emphasis in original).[8] *Montana* v. *Clark*, 749 F.2d at

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[8] The Court of Appeals said:

> The 60 day period for seeking judicial review set forth in the Hobbs Act is jurisdictional in nature, and may not be enlarged or altered by the courts. This time limit, like other similar limitations, serves the important purpose of imparting finality into the administrative process, thereby conserving administrative resources and protecting the reliance interests of regulatees who conform their conduct to the regulations. These policies would be frustrated if untimely procedural challenges could be revived by simply filing a petition for rulemaking requesting rescission of the regulations and then seeking direct review of the petition's denial. Indeed, the implications of the rule of law urged by the NRDC are staggering, for its logic knows no bounds; such a rule would permit procedural challenges to be brought twenty, thirty, or even forty years after the regulations were promulgated. No greater disregard for the principle of finality could be imagined.
>
> We are aware that the right to petition for repeal of a rule is recognized by both the APA and the Commission's rules. We also acknowledge that we have scrutinized regulations immune from direct review by reviewing the denial of a subse-

744, n.8 approved *NRDC* on this very point: "* * * the court in *NRDC* explicitly acknowledged that where, as here, the petitioner challenges the *substantive* validity of a rule, failure to exercise a prior opportunity to challenge the regulation ordinarily will not preclude review. 666 F.2d at 602." The "procedure/substance distinction" was also followed by the Fifth Circuit in *Texas*, 749 F.2d at 1146, text and note at n.28, citing *NRDC*, *Functional Music* and *Illinois Central Gulf*.

(c) The government boldly asserts that the "ruling below conflicts with decisions of other courts of appeals that have held the Hobbs Act's time limit to be jurisdictional." (Pet. 11.) The claimed intercircuit conflict is entirely spurious. The court below did not deny (and we agree) that the Hobbs Act's time limit is jurisdictional; that is the only issue on which the five assertedly conflicting court of appeals decisions (*id.*) support the government. Rather, the court below disagreed with the government's position on the entirely distinct question of what that jurisdictional time limit means in the context of subsequent litigation involving the substance of the rule. On that issue, which alone is presented by the government's petition, the decision of the court below is, as we have seen, in accord with those decisions of the Dis-

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quent rulemaking petition which challenged the regulations on demonstrable grounds of *substantive* invalidity. For example, we have permitted such indirect challenges when an agency is alleged to have issued regulations which are not authorized by their parent legislation, or when changed circumstances have alleged deprived regulations of their factual foundation and have thereby brought them into conflict with such legislation. NRDC has cited no case, however, and we are not aware of any, that has allowed the foregoing authority to permit back door procedural challenges by those who had the opportunity to seek direct review of regulations but failed to do so in a timely fashion. [666 F.2d at 602, footnotes omitted, emphasis in original]

trict of Columbia Circuit in *NRDC* and *Geller*; in this connection we specially invite the Court's attention to pp. 11-12, n.8, *supra*, quoting the *NRDC* opinion. The other three cases cited at Pet. 11 do not address the present issue at all, but deal with questions concerning when the 60-day jurisdictional period begins to run.[9]

(d) The government expresses concern that if the courts of appeals "feel free to entertain challenges to the substantive validity of this same ICC rule," "uncertainty will prevail and litigation will abound." (Pet. 13, 14.) That prospect is indeed real, because, contrary to the government's argument elsewhere in the petition, the courts of appeals have rejected its interpretation of the Hobbs Act; *Texas* v. *United States* and *Montana* v. *Clark*, cited at Pet. 13, n.13 are the most recent decisions of the Fifth and District of Columbia Circuits on this point. See pp. 10, 11-12, *supra*. But it does not follow that the government's petition should be granted, for it is most unlikely that the "uncertainty" can be removed in No. 84-1515. Putting the matter most favorably to the government, both this Court's jurisdiction over its petition and the merits of its Hobbs Act theory are questionable at best. If either of those issues is decided against the government, the "uncertainty" concerning the validity of the ICC's new policy will remain. Only a decision in No. 84-1518 can resolve the matter, either by sustaining the government's Hobbs Act jurisdictional position, which must be reached first, *see* p. 9, *supra*, or by adjudicating the merits of the validity of the "special circumstances" doctrine.

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[9] In each of those cases the petitions were held to be timely. *New York* v. *United States*, 568 F.2d 887, 892-983 (C.A. 2 1977); *Chem-Haulers, Inc.* v. *United States*, 536 F.2d 610, 613-616 (C.A. 5 1976); *Microwave Communications, Inc.* v. *FCC*, 515 F.2d 385, 388-390 (C.A. D.C. 1974).

CONCLUSION

For the foregoing reasons, the petition for certiorari in No. 84-1515 should be denied.

Respectfully submitted,

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No. 84-1515

In the Supreme Court of the United States

OCTOBER TERM, 1984

INTERSTATE COMMERCE COMMISSION, ET AL.,
PETITIONERS

v.

TRI-STATE MOTOR TRANSIT CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL PETITIONERS

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In the Supreme Court of the United States

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No. 84-1515

INTERSTATE COMMERCE COMMISSION, ET AL., PETITIONERS

v.

TRI-STATE MOTOR TRANSIT CO., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY MEMORANDUM FOR THE FEDERAL PETITIONERS

Respondents' effort to divert attention from the impact of the decision below on the Hobbs Act's principle of finality warrants a brief response.

1. It is not the case, as respondents argue (Br. in Opp. 10), that the Hobbs Act issue is "insubstantial" and was decided in a fashion that "accords with the law in the other circuits which have ruled." Quite the opposite. The United States Court of Appeals for the District of Columbia Circuit (one of the courts upon whose decisions respondents rely) recently commented (*Aluminum Co. of America* v. *ICC*, No. 83-1730 (May 10, 1985), slip op. 11) on

> the apparent conflict in the expression of our cases on the question whether, in the course of an appeal from an agency decision applying a rule to a specific set of facts, we may entertain a challenge to the rule itself

after the jurisdictional deadline for direct review of the rule has expired. See *Network Project* v. *FCC,* 511 F.2d 786, 789 n.1 (D.C. Cir. 1975) (rule may be challenged in such circumstances); *Asphalt Roofing Manufacturers Association* v. *ICC,* 567 F.2d 994, 1005 (D.C. Cir. 1977) (rule may not be challenged in such circumstances); *Investment Company Institute* v. *Board of Governors of the Federal Reserve System,* 551 F.2d 1270, 1282 n.13 (D.C. Cir. 1977) (rule may be challenged in such circumstances only by a party with a valid excuse for failing to pursue direct attack).

The other court of appeals to which respondents refer, the Fifth Circuit, has been similarly equivocal. In *Texas* v. *United States,* 730 F.2d 409 (1984), petition for cert. pending, No. 84-1712, the court rejected the government's Hobbs Act jurisdictional objection; but in *RSR Corp.* v. *Donovan,* 747 F.2d 294, 301-302 (1984), the court upheld a similar jurisdictional contention.

Far from being settled questions, the Hobbs Act's jurisdictional limitations are presently a source of substantial uncertainty and considerable litigation. This Court's review is fully warranted.

2. Respondents also contend (Br. in Opp. 3) that this Court lacks jurisdiction over our petition because the government "prevailed on the merits" in the court of appeals. This Court has, of course, recognized in other contexts that jurisdiction "is a matter wholly separate from and independent of the merits." *Construction Laborers* v. *Curry,* 371 U.S. 542, 548 (1963). In this case, the court of appeals' assertion of jurisdiction has a real and continuing adverse impact. The Hobbs Act has been turned on its head. In place of the repose and centralized review the statute prescribes, the court of appeals has substituted a regime in which duplicative challenges can be launched well

after the statutory time limit has expired. The government, accordingly, "retains a stake in the appeal" (*Deposit Guaranty National Bank* v. *Roper,* 445 U.S. 326, 334 (1980)) that satisfies the standards governing this Court's jurisdiction.

Respondents acknowledge (Br. in Opp. 13) that the concern we expressed in our petition that " 'uncertainty will prevail and litigation will abound' " is "indeed real." That is because the incorrect assertion of jurisdiction to review federal agency regulations unnecessarily subjects the government, more so than a private party, to uncertainty in enforcement, compliance, and nationwide uniformity. Cf. *United States* v. *Mendoza,* No. 82-849 (Jan. 10, 1984), slip op. 5, quoting *INS* v. *Hibi,* 414 U.S. 5, 8 (1973) (" 'the Government is not in a position identical to that of a private litigant' "). In these circumstances, not only is it necessary to correct the lower court's misapprehension of the scope of its power to review agency orders, but, as this Court recognized in *Deposit Guaranty National Bank*, and *Electrical Fittings Corp.* v. *Thomas & Betts Co.,* 307 U.S. 241, 242 (1939), certiorari is an appropriate mechanism for instructing the lower courts on the scope of their powers.

Finally, respondents argue unpersuasively that 28 U.S.C. 1254(1) does not authorize our petition despite its plain language permitting "any party" to seek a writ of certiorari. They ignore, however, the clear language of the Hobbs Act, 28 U.S.C. 2350(a) (emphasis added), which allows "[t]he United States, the agency, *or* an aggrieved party" to petition for a writ of certiorari.

For the foregoing reasons, and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted. The Court may wish to consolidate this case with *ICC* v. *Texas,* No. 84-1712, or to hear the cases in tandem.

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